IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 366 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GOVINDBHAI H VASAVA

Versus

STATE OF GUJARAT

Appearance:

MR PM THAKKAR for Petitioner

MR K C SHAH, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

Date of decision: 10/09/98

ORAL JUDGEMENT Per Bhatt,J.

In this appeal under section 374 of the Code of Criminal Procedure, 1973 ('the Code'), the only question with which we are confronted to examine and adjudicate upon is whether the appellant-accused No.1 is qualified and is entitled to benefit of provisions of Exceptions 1 and/or

4 to Section 300 of the Indian Penal Code ('IPC') prescribing what is murder.

The prosecution case shortly stated is that on 8.10.1991, at about 8 p.m. when deceased Bhailal Vasava was at his place, original accused No.3 Mathurbhai Jesingbhai Vasava started firing crackers as a result of which, the bullocks of Bhailal were frightened and as such,started jumping. Therefore, the deceased told accused No.3 Mathur to stop cracker firing. At that time, Ganpat Hathisinh ,accused No. 2 and Hathisinh Madhabhai ,accused No.4 were also present They started quarrelling .On seeing this, Pravin,son of the deceased Bhailal ran to his elder brother Ramesh's place and informed him about the incident. That is how, Ramesh and his wife Kapila immediately went to the venue where the quarrel was going on.

According to the prosecution case, accused No-2 Ganpat Vasava had given a stick blow on the head of deceased Bhailal and the deceased had, as such, reciprocated it with a piece of brickbat to accused No.4 Hathisinh. Thereafter, complainant Ramesh , his wife Kapila and the deceased went to Nagjibhai's place to inform the police on telephone. In the meantime, the appellant-accused No.1 went there where the deceased was standing outside -far from the house of Nagjibhai and he started giving successive blows with a sword on the person of deceased Bhailal which culminated into his death.

Upon complaint of the son of the deceased, Ramesh,exh.13, the offence came to be registered against the appellant and three other accused persons who,upon investigation by the police, were sent up for trial in sessions case no. 16 of 1992 for the offences punishable under sections 302, 323 read with section 114 of the IPC and in addition to that, accused Nos. 2 and 3 were also charged for the offence punishable under section 135 of the Bombay Police Act.

In support of the charges against the accused persons, prosecution relied on the following witnesses:

P.W.1 Dr Uday Ramchanedra, Exh.10
' 2 Ramesh Bhailalbhai 12
" 3 Kalpana Rameshbhai 17
' 4 Rasulbhai Dadabhai 18
' 5 Pravin Bhailalbhai 21
' 6 Mubarakbhai B. 22
' 7 Gajendra Shankerrao 25
' 8 Nagjibhai Paragbhai 28 and

Prosecution also placed reliance on the following documentary evidence:

Post mortem notes, exh.11
Complaint 13
Cross complaint 16
Map of the scene 32 and
of offence.
Extracts of stn.diary 35, 36.

Upon examination and evaluation of the evidence led by the prosecution, the trial court held the present appellant -accused No.1 guilty for the offence punishable under section 302 and sentenced him for imprisonment of life and fine of Rs.2,000/- in default, R.I. for six months and acquitted the accused persons of the charge under section 323 read with section 114,IPC as also section 135 of the Bombay Police Act.In the result, at the instance of original accused No.1, the impugned order of conviction and sentence under section 302 has been questioned before us in this appeal under section 374 of the Code.

As observed by us at the outset, the only question which has been raised before us is that the trial court has committed serious error in not giving benefit of provisions of Exceptions 1 and/or 4 of Section 300 of the IPC. In course of repeated submissions on this count, it has been pointed out from the evidence of eye witness -complainant- Ramesh that the accused was initially not present but in view of the fact that his father was beaten and injured by deceased Bhailalbhai , he got provoked and so much so that he lost control of himself , rushed to Bhailbahai who was standing near the house of Nagjibhai and went on giving sword blows. It was,therefore, submitted before us that since there was incriminating action on the part of accused No.1 generating great provocation ,Exceptions 1 and/or 4 to Section 300 would be attracted and the accused will be entitled to benefit thereof. This submission is seriously countenanced by the learned Additional Public Prosecutor Mr. K.C.Shah.

Well, in order to succeed in availing statutory benefit engrafted in Exceptions 1 and/or 4, the accused is obliged to prove or to show from the evidence led, the following aspects:

(i) there was sudden fight;

(ii) there was no pre-meditation ;
(iii) the act was done in a heat of passion,and
(iv) that the assailant had not taken any undue advantage or acted in a cruel manner.

If the aforesaid ingredients, the burden of proof of which rests on the person who propounds it or claims it, are estabished, the offence will be culpable homicide not amounting to murder; whereas, in case of claiming benefit of Exception 1, the three provisos , first, secondly and thirdly must be shown to have existed.

No doubt, it is true that the cause of quarrel is not relevant nor it is relevant who offered provocation or started assault. It is also true that number of injuries or injuries caused during the occurrence is not the only decisive factor .What is important is that the occurrence must have been sudden and unpremediated and the offender must have acted in heat of passion or heat of anger. Equally true, is the fact that the offender must not have taken any undue advantage of the situation.. He also must not have acted in a cruel manner .Where on sudden provocation or quarrel, the person in the heat of moment picks up a weapon which is handy and causes injuries one of which proves fatal, he would be obviously entitled to the benefit of Exceptions and in that case, though death has occurred, it would be culpable homicide not amounting to murder punishable under section 304-I of the IPC, as the case may be.

After having taken a close look into the testimonial collections ,we have successfully noticed that the following ingredients and aspects have remained unimpeachable:

(i) In light of the evidence of eye witness Ramesh,P.W.2 exh.12 ,son of the deceased , supported by the evidence of P.W.3-Kapila, wife of the complainant,exh.17, it becomes quite evident that there was no, as such,question of any provocation much less sudden and grave provocation.

(ii) The manner and mode in which the actual incident under scrutiny before us arose, was preceded by a fight between deceased Bhailal and his group and the father of accused No.1 -appellant Hathisinh with the use of stick which is quite evident from the cross complaint produced at exh. 16. It was lodged by the father of the accused Hathisinh which itself speaks that it was the outcome of

the quarrel and fight. Hence, presence is evident.

(iii) Upon anslysis of the facts, a conclusion with the yardstick of a reasonable and prudent man would be that it was not, as such, a case of provocation at all. The fight which preceded before the main incident came to be revived by accused No.1 in company of three other accused.

(iv) Not only that, if we were to hold that there was case of sudden provocation,benefit of Exceptions 1 and/or 4 to Section 300 cannot be afforded to the accused for the simple reason that the impediment that the accused must not have acted in unusual or cruel manner remained unclear. In other words,looking to the type of injuries apart, number of injuries apart, manner and mode in which successive blows came to be inflicted upon the person of the deceased by accused No.1 with the help of deadly weapon like sword and some of them on the vital part of the body even leading to chop wound on the neck, there would not be slightest hesitation in finding that even in the alternative, the accused cannot be said to have acted in usual fashion and manner.In fact, we are satisfied that the accused had, as such, acted in a cruel manner apart from being unusual which as such, is indicative not of radiating an imprint of provocation but vindictiveness or revenge.

It cannot also be said that that incriminating action of the accused was not untainted with taking undue advantage as the deceased whose life was cut short by the accused by giving almost seven successive blows with the sword and some of them on the vital part of the body was aged about 60 which is nearer to the average mortality age in India ; whereas the accused was 41 years old.The deceased was unarmed.The accused not only that he was armed with deadly weapon like sword not as if he had picked up from the surrounding place being handy but as such, had run to his house and had brought the sword and had given successive seven blows one after other .

In our opinion, the trial court has rightly appreciated and evaluated the testimony of eye witness Ramesh,P.W.2 ,son of the deceased and P.W.3 Kapila,wife of Ramesh,the second eye witness and P.W.4 Rasulbhai Dadabhai,eye witness who have fully reinforced the version of the prosecution.Though a contention is not raised about the

nature of death, the prosecution has successfully established that the deceased died a homicidal death , by leading evidence of the medical officer,P./W.2 Dr. Uday Ramchandra at exh. 10. In view of the evidence on record, the prosecution has certainly established that the deceased died a homicidal death.Section 299 provides for culpable homicide.

Then,the question which is required to be examined is whether culpable homicide is proved to be murder as defined in section 300 or whether it is shown to be falling within any one of the Exceptions so that complicity can be said to be of culpable homicide not amounting to murder. Repeated attempts were made to convince us that homicidal death of deceased Bhailal was not a murder and,therfefore,was not punishable under Section 302 but was punishable under Section 304. However, the same have no legal reason or credence from the evidence relied on by the prosecution which we have extensively examined. Therefore, in our opinion, this is not a case of culpability of the accused of culpable homicide not amounting to murder but is a simple and clear case of murder as defined under Section 300 and,therefore, is punishable under Section 302.

Relying on the decision of the Honourable Apex court in Surinder Kumar vs. Union Territory,AIR 1989 SC 1094, it was submitted that the provisions of Section 302 are not attracted to the present case. It was also submitted that this decision is followed by this court in Patel Chhotlal Ranchhodbhai vs. State, 1990 (1) GLH,43. After having examined dispassionately both the decisions, we have no hesitation in holding that ratio of the decisions is not applicable to the facts of the present case. It may be mentioned that there would not be any question of applicability of provisions of Exception 1 to Section 300 in the present case technically also because the accused was not present at the relevant time when the incident was preceded which is alleged to have given so much sudden and grave provocation that he could not resist the temptation of giving seven successive sword blows losing his self control. Therefore,legally and factually, both the Exceptions to Section 300 are not applicable to the facts of the present case and the impugned judgment and order of the trial court in sessions case No. 16 of 1992 holding the accused-appellant before us guilty for the offence punishable under Section 302 is quite justified requiring no interference. Since the offence under Section 302 is held proved,rightly by the trial court and we affirm it, there would not arise any question of quantification of sentencing as the trial court has

awarded the minimum sentence .In the circumstances, we have no other alternative but to dismiss this appeal in its entirety The same is, accordingly, dismissed.

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